

1 DAVID R. EBERHART (S.B. #195474)
deberhart@omm.com
2 JAMES K. ROTHSTEIN (S.B. #267962)
jrothstein@omm.com
3 DANIEL H. LEIGH (S.B. #310673)
dleigh@omm.com
4 O'MELVENY & MYERS LLP
Two Embarcadero Center
5 28th Floor
San Francisco, California 94111-3823
6 Telephone: +1 415 984 8700
Facsimile: +1 415 984 8701
7

8 Attorneys for Plaintiffs
ELASTICSEARCH, INC. and
ELASTICSEARCH B.V.
9

10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11 **OAKLAND DIVISION**
12
13

14 ELASTICSEARCH, INC., a Delaware
corporation, and ELASTICSEARCH B.V., a
15 Dutch corporation,

16 Plaintiffs,

17 v.

18 FLORAGUNN GmbH, a German corporation,

19 Defendant.
20
21

Case No. 4:19-cv-05553-YGR

**PLAINTIFFS ELASTICSEARCH, INC.
AND ELASTICSEARCH B.V.'S
OPPOSITION TO DEFENDANT
FLORAGUNN GMBH'S MOTION TO
EXCLUDE PORTIONS OF
TESTIMONY OF PLAINTIFFS'
EXPERT MARTIN WALKER**

Date: October 12, 2021
Time: 2:00 p.m.
Judge: Hon. Yvonne Gonzalez Rogers
Dept: Courtroom 1 – 4th Floor
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant floragunn’s Motion to Exclude Portions of the Testimony of Plaintiffs’ Expert Martin Walker (Dkt. 160) (“Motion” or “Mot.”) should be denied. First, in forming his opinions on a reasonable opportunity to access Elastic’s works through decompilation, Dr. Walker used reliable methods and considered sufficient evidence. Dr. Walker based his opinion on (1) his experience decompiling Java binaries, (2) indicia of decompilation he found in floragunn’s accused source code, (3) the widespread availability of Elastic’s binaries, (4) the technical ease by which floragunn would have been able to decompile Elastic’s binaries, and (5) the admission of Hendrik Saly—the author of *all* of the accused code that was created through decompilation—that he had decompiled Elastic binaries. Second, Dr. Walker engaged in an appropriate comparison in opining that that a reasonable computer programmer would find the floragunn and Elastic source code substantially similar in total concept and feel—he compared floragunn and Elastic source code in the context of the broader works. At most, floragunn’s criticisms of Dr. Walker’s opinions go to their weight.

II. STATEMENT OF FACTS

A. floragunn Copied Multiple Portions of Elastic’s Code

Elastic makes the Elastic Stack, a suite of offerings centered on Elastic’s search and analytics engine, Elasticsearch. Declaration of David Eberhart in Support of Elastic’s Opposition Ex. A (Elastic 2020 10-K) at 4.¹ The Elastic Stack also includes Kibana, which is a data visualization user interface for Elasticsearch. *Id.*

Elastic offers X-Pack, a set of add-on features to Elasticsearch and Kibana that includes security, alerting, monitoring, and reporting. Ex. B (Astrachan Report) ¶ 26; Ex. C (“X-Pack 5.0.0 Released” blog post). floragunn markets and distributes a set of add-on features (or a “plug-in”) for Elasticsearch called Search Guard, which competes with X-Pack. Ex. D (March 1, 2021 Deposition of Jochen Kressin) 13:10-12; Ex. E (April 15, 2021 Rule 30(b)(6) Deposition of

¹ Except where expressly stated, all lettered exhibits herein are exhibits to the Declaration of David Eberhart in Support of Elastic’s Opposition.

Jochen Kressin) 247:16-250:4. Shield was an Elastic offering that was the predecessor to much of X-Pack. Ex. B ¶ 26; Ex. C.

Elastic alleges that, between 2016 and 2019, floragunn copied multiple and critical portions of the proprietary source code for Elastic’s X-Pack and Shield offerings into floragunn’s Search Guard product. Elastic’s First Am. Compl (Dkt. 23) (“FAC”) ¶ 4, 19, 84; Ex. F (March 9, 2021 Rule 30(b)(6) Deposition of J. Kressin Ex. 185). At all relevant times, the object code, or “binaries,” corresponding to the infringed Elastic code has been widely available to the public. But because the source code for X-Pack and Shield was not publicly available until April 2018, Elastic alleges that, for infringement occurring before April 2018, floragunn accessed Elastic source code through decompilation of Elastic’s binaries. FAC ¶¶ 6, 21.²

B. Hendrik Saly—Who Played a Central Role in floragunn’s Copying—Admitted to Decompiling Elastic’s Binaries and is Now Unavailable for Deposition

Hendrik Saly, floragunn’s Chief Technology Officer [REDACTED], played a central role in floragunn’s copying. J. Kressin Decl. (Dkt. 127) ¶¶ 15, 16. Mr. Saly wrote and committed to Search Guard accused code segments on 12 separate occasions between February 13, 2016 and June 7, 2018, including *all* of the accused code that Elastic contends floragunn created through decompilation of Elastic’s binaries. Ex. F; Ex. G (Walker Report) ¶¶ 89, 105, 120, 189, 227. The remaining code was written by three other authors—two of whom refused to appear for deposition and were fired by floragunn—in different, non-compiled computer languages (Javascript and AngularJS extensions to HTML). Joint Discovery Letter (Dkt. 100); J. Kressin Decl. (Dkt. 107); Ex. F; Ex. G ¶¶ 140, 153, 169, 200, 285.

² Computer programs are written in source code, consisting of “specialized alphanumeric languages,” which is generally readable by software developers. *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1514 n.2 (9th Cir. 1992); Ex. G ¶ 53. “In order to operate a computer, source code must be translated into computer readable form, or ‘object code’. Object code uses only two symbols, 0 and 1, in combinations which represent the alphanumeric characters of the source code.” *Sega Enterprises Ltd.*, 977 F.2d at 1514 n.2. Object code is not generally readable by software developers. Ex. G ¶ 53. However, object code can be converted back into source code: “Devices called ‘disassemblers’ or ‘decompilers’ can reverse this process by ‘reading’ the electronic signals for ‘0’ and ‘1’ that are produced while the program is being run, storing the resulting object code in computer memory, and translating the object code into source code.” *Sega Enterprises Ltd.*, 977 F.2d at 1514 n.2. Decompilers are “commercially available” and “widely used within the software industry.” *Id.*

As floragunn concedes, Mr. Saly has a deep history with Search Guard: “floragunn’s security plugin Search Guard traces its roots to October 2013, when Hendrik Saly, then an independent programmer, but now floragunn’s Chief Technology Officer, developed the first complete security plugin solution for the Elasticsearch search engine, appropriately called ‘Elasticsearch Security Plugin’ (‘ESP’).” floragunn’s Amended Answer (Dkt. 82) at 48-49. Mr. Saly subsequently developed a successor Elasticsearch security plugin called Defender and, “[i]n May 2015, floragunn acquired an exclusive license from Mr. Saly for the Defender security plugin and set out to improve the code for the product before formally launching Defender rebranded as ‘Search Guard.’” *Id.* at 49.

floragunn claims that it did not “hire Saly until November 15, 2018.” Mot. at 5. But this improperly minimizes Mr. Saly’s role: not only did he create the code that was the basis for Search Guard, (1) [REDACTED], Ex. H (March 1, 2021 J. Kressin Dep. Ex. 161); and (2) he continued to make contributions to Search Guard from 2016 to 2018, including contributing to Search Guard more than two-thirds of the infringing code before November 15, 2018. Ex. F.

On February 3, 2015, Mr. Saly held a conversation with Uri Boness, one of the co-founders of Elastic, about a potential job with Elastic. Ex. I (Deposition of Uri Boness) 24:19-25, 31:10-33:14; Declaration of Michael Kwun in Support of floragunn’s Motion Ex. D. In that conversation, Mr. Saly stated that he noticed certain differences between how Elastic’s Shield product implemented security and how he implemented security in Defender. Ex. I 33:3-33:14. When Mr. Boness asked Mr. Saly how he knew this detail, Mr. Saly admitted to decompiling the binaries for Elastic’s Shield product. *Id.* Mr. Boness told Mr. Saly that decompiling Elastic’s Shield binaries was “not allowed.” *Id.* 33:3-34:12.

On November 25, 2020, counsel for Elastic contacted counsel for floragunn to attempt to schedule Mr. Saly’s deposition in this matter. Ex. J (Nov. 25, 2020 Email from J. Rothstein). In response, counsel for floragunn informed counsel for Elastic for the first time that Mr. Saly [REDACTED] and was unavailable to be deposed. Joint Discovery

Letter (Dkt. 101-3) at 2. Elastic continued seeking Mr. Saly's deposition and issued Requests for Production for documents supporting Mr. Saly's unavailability. *Id.*; Ex. K (Elastic's Fifth RFPs to floragunn) RFP No. 103. floragunn began to produce [REDACTED] purporting to document Mr. Saly's [REDACTED] throughout the relevant time period. Joint Discovery Letter (Dkt. 101-3) at 2-3; *see* Ex. L (Feb. 9, 2021 Email from V. Rivkin). On February 9, 2021 floragunn's counsel wrote that "we do not currently anticipate that he will be [REDACTED] sufficient to be produced for deposition before the end of fact discovery." *Id.* Based on floragunn's counsel's representations, in February 2021, the parties entered into a stipulation prohibiting Mr. Saly's participation in any way in this lawsuit in lieu of Elastic seeking to compel Mr. Saly's deposition. Order Granting Stipulation Regarding H. Saly (Dkt. 76).

Elastic subsequently learned that Mr. Saly's [REDACTED] indicates that he was [REDACTED] [REDACTED]. Joint Discovery Letter (Dkt. 101-3) at 2-3; floragunn Separate Statement (Dkt. 116). This, of course, was during the time period that Elastic was seeking Mr. Saly's deposition. Based on this evidence, Elastic contends that Mr. Saly was in fact available for deposition, and Elastic is currently seeking sanctions against floragunn for its failure to produce Mr. Saly. Joint Discovery Letter (Dkt. 101-3) at 2-3. After Elastic filed its motion for sanctions, [REDACTED] [REDACTED]. J. Kressin Decl. (Dkt. 127) ¶ 16. However, German corporate records indicate that Mr. Saly has an ongoing business relationship with floragunn's current co-CEOs. Letter Brief (Dkt. 129) Exs. A-C.

C. Dr. Walker's Technical Opinions

Dr. Walker has a PhD in Electrical Engineering, 35 years of experience designing complex software systems, and 15 years of experience analyzing or reverse engineering complex software systems. Ex. G ¶ 1, 2. Over the past 20 years, Dr. Walker has been retained as an expert in more than three dozen software-related matters and has testified at deposition, hearing, or trial more than 40 times. *Id.* Attachment A. Elastic engaged Dr. Walker to examine the relevant floragunn and Elastic source code and render an expert opinion regarding whether the floragunn source code was copied from the Elastic source code or is a derivative work of that source code.

1 *Id.* ¶ 14. Dr. Walker’s analysis concluded that multiple instances of floragunn source code were
 2 substantially similar to protectable elements of the Elastic source code. *Id.* ¶ 20. Dr. Walker
 3 further considered evidence of floragunn’s access to Elastic’s source code, and, combined with
 4 that evidence of access, found multiple instances of floragunn source code that were copied from
 5 Elastic code. *Id.* Relevant to this motion, Dr. Walker further opined that “given the similarities
 6 [he] identified between the Elastic and floragunn source code, an ordinary, reasonable computer
 7 programmer would find the source code substantially similar in total concept and feel.” *Id.* ¶ 22.

8 Dr. Walker also opined that floragunn accessed Elastic’s Java source code before April
 9 2018 by decompiling Elastic’s binaries, which Elastic distributed widely over the internet. *Id.*
 10 ¶¶ 31, 89, 105, 120, 189, 227; Ex. M (Walker Reply Report) ¶ 8 (opining that floragunn “could”
 11 and “did” decompile Elastic’s binaries). In forming this opinion, Dr. Walker relied on (1) his
 12 experience decompiling Java binaries, (2) indicia of decompilation he found in floragunn’s source
 13 code, (3) the widespread public availability of Elastic’s binaries at the time of the creation of the
 14 infringing code, and (4) the technical ease by which floragunn would have been able to decompile
 15 Elastic’s binaries. *See* § IV.A, *infra*.³

16 Dr. Walker also relied on the admission by Mr. Saly—the author of *all* of the infringing
 17 code to which Dr. Walker’s decompilation opinion applies—that Mr. Saly had decompiled
 18 Elastic’s Shield binaries while developing a predecessor security product (Defender) that was
 19 used to create Search Guard. *See* Ex. G ¶¶ 89, 105, 120, 189, 227, 233; Ex. I 31:10-33:14. Dr.
 20 Walker relied on this admission to demonstrate that Mr. Saly had the ability to decompile
 21 Elastic’s code and knew the benefits of decompiling Elastic’s code. Ex. N (Deposition of Dr.
 22 Martin Walker) 125:14-22. As floragunn notes in its motion, Dr. Walker relied on an account of
 23 Mr. Saly’s admission given in deposition testimony by Uri Boness, a co-founder of Elastic. *See*
 24 Ex. G ¶¶ 89, 105, 120, 189, 227, 233. Dr. Walker was not able to rely directly on statements by
 25 Mr. Saly, because floragunn has not made Mr. Saly available for deposition.

26
 27
 28 ³ As noted above, before April 2018, the source code for Shield and X-Pack was not publicly
 available (it has since been made source-available, although it is still proprietary). Ex. G ¶ 30.

1 III. LEGAL STANDARD

2 Under *Daubert*, courts act as gatekeepers to admit expert testimony that “help[s] the trier
3 of fact to understand the evidence or determine a fact in issue” and is based on “sufficient facts or
4 data,” “reliable principles and methods,” and a reliable application of those principles and
5 methods “to the facts of the case.” Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms., Inc.*,
6 509 U.S. 579, 597 (1993). “[T]he judge is supposed to screen the jury from unreliable nonsense
7 opinions, but not exclude opinions merely because they are impeachable.” *Alaska Rent-A-Car,*
8 *Inc. v. Avis Budget Grp.*, 738 F.3d 960, 969–70 (9th Cir. 2013). Further, even “[s]haky but
9 admissible evidence is to be attacked by cross examination, contrary evidence, and attention to
10 the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010). In other
11 words, “[w]hen an expert meets the threshold established by Rule 702 as explained in *Daubert*,
12 the expert may testify and the jury decides how much weight to give that testimony.” *Id.* at 565.

13 Under Federal Rule of Evidence 703, “[a]n expert may base an opinion on facts or data in
14 the case that the expert has been made aware of or personally observed.” Fed. R. Evid. 703.
15 Under this standard, an expert may rely on “presentation of data to the expert outside of court and
16 other than by his own perception.” Advisory Committee Notes to 1972 Proposed Rules, Fed. R.
17 Evid. 703. “If experts in the particular field would reasonably rely on those kinds of facts or data
18 in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”
19 Fed. R. Evid. 703.

20 A plaintiff proves copyright infringement by showing ownership of a valid copyright and
21 that defendant copied protected elements of the copyrighted work. *Cavalier v. Random House,*
22 *Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). “Copying may be established by showing that the
23 infringer had access to plaintiff’s copyrighted work and that the works at issue are substantially
24 similar in their protected elements.” *Id.* Courts in the Ninth Circuit “employ a two-part
25 analysis . . . —an extrinsic test and an intrinsic test—to determine whether two works are
26 substantially similar.” *Id.* “The ‘extrinsic test’ is an objective comparison of specific expressive
27 elements.” *Id.* In contrast, the “‘intrinsic test’ is a subjective comparison that focuses on whether
28 the ordinary, reasonable audience would find the works substantially similar in the total concept

1 and feel of the works.” *Id.* (internal quotation marks omitted). However, the intrinsic test still
 2 focuses on the expression of a work. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435,
 3 1442 (9th Cir. 1994) (“[T]he intrinsic test continues to measure expression subjectively.”). “In the
 4 context of computer programs, the ‘ordinary reasonable person’ with the ability to intelligently
 5 respond to computer expression is a computer programmer.” *Atari Games Corp. v. Nintendo of*
 6 *Am. Inc.*, 975 F.2d 832, 844 (Fed. Cir. 1992) (applying Ninth Circuit law); *Mobile Active Def.,*
 7 *Inc. v. Los Angeles Unified Sch. Dist.*, No. CV1508762RGKGJSX, 2015 WL 12860491, at *3
 8 (C.D. Cal. Dec. 14, 2015) (quoting *Atari Games Corp.*, 975 F.2d at 844).

9 A plaintiff proves access to a copyrighted work by showing that a defendant had “a
 10 ‘reasonable opportunity’ or ‘reasonable possibility’ of viewing the plaintiff’s work.” *Three Boys*
 11 *Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000), *overruled on other grounds by*
 12 *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).
 13 “Circumstantial evidence of reasonable access is proven in one of two ways: (1) a particular chain
 14 of events is established between the plaintiff’s work and the defendant’s access to that work (such
 15 as through dealings with a publisher or record company), or (2) the plaintiff’s work has been
 16 widely disseminated.” *Id.* A “reasonable possibility” is more than a “bare possibility in the sense
 17 that anything is possible,” but “[a]t times, distinguishing a ‘bare’ possibility from a ‘reasonable’
 18 possibility will present a close question.” *Id.* (citation omitted).

19 **IV. DR. WALKER’S DECOMPILE OPINION IS NOT SPECULATIVE AND IS** 20 **BASED ON SUFFICIENT FACTS AND RELIABLE METHODS**

21 There are multiple, independently-sufficient bases for Dr. Walker’s opinion on access to
 22 Elastic code through decompilation. In forming his opinion, Dr. Walker relied on (1) his
 23 experience decompiling Java binaries, (2) indicia of decompilation he found in floragunn’s
 24 accused source code, (3) the widespread availability of Elastic’s binaries, (4) the technical ease by
 25 which floragunn would have been able to decompile Elastic’s binaries, and (5) the admission of
 26 Hendrik Saly—the author of *all* of the accused code that was created through decompilation—
 27 that he had decompiled Elastic binaries.

28 Direct testimony by Mr. Saly regarding his decompilation of Elastic code is impossible to

1 obtain because floragunn has declined to make Mr. Saly available for deposition. Joint Discovery
 2 Letter (Dkt. 101-3). But direct evidence of access to a copyrighted work is not required—it is
 3 perfectly acceptable to establish access through circumstantial evidence. *Three Boys Music Corp.*,
 4 212 F.3d at 482. And that is exactly what Dr. Walker has done—he has not only demonstrated that
 5 Elastic’s binaries have been widely disseminated, he has relied on circumstantial evidence that
 6 Mr. Saly did in fact decompile Elastic’s binaries. But Dr. Walker’s opinion would be relevant and
 7 admissible even if he only opined that Mr. Saly could have accessed Elastic’s source code
 8 through decompilation, because such an opinion would support floragunn’s “‘reasonable
 9 opportunity’ or ‘reasonable possibility’ of viewing” Elastic’s source code. *Id.*

10
 11 **A. Dr. Walker Has Offered a Reliable Opinion that Considers the Evidence in this Case**

12 Dr. Walker notes—and it is undisputed—that Elastic’s Shield and X-Pack binaries are and
 13 have been widely available. Ex. G ¶ 31; Ex. M ¶ 12. He further opines that decompilation of those
 14 binaries is technically possible and straightforward. Ex. G ¶¶ 89, 105, 120, 189, 227; Ex. M
 15 ¶ 8.a.i; Ex. N 127:12-22. Dr. Walker’s bases this opinion on his technical experience. Ex. M
 16 ¶ 8.a.i (“I have personal experience performing such reverse compilation and I know it is straight-
 17 forward.”).

18 floragunn’s technical expert, Dr. Owen Astrachan, [REDACTED]

19 [REDACTED]
 20 [REDACTED] Ex. B ¶ 181. He
 21 testified that he “did not have any difficulty” doing so and that “many reasonable developers,”
 22 including floragunn developers, would have been able to do the same thing he did. Ex. O
 23 (Deposition of Dr. Owen Astrachan) 191:23-192:12. Hence, even Dr. Astrachan contradicts
 24 floragunn’s argument that the Elastic source code was “locked in a vault.” Mot. at 6.

25 The relationship between floragunn’s product and Elastic’s products further supports Dr.
 26 Walker’s conclusion regarding decompilation. Floragunn touted its speed in releasing new
 27 versions of Search Guard when Elastic released new version of Elasticsearch, so floragunn was
 28 undoubtedly familiar with Elastic’s distribution of binaries. *See* Ex. D 13:13-19. floragunn was in

1 the Elasticsearch security business, and it, of course, was interested in staying informed of its
 2 competitor's activities. *See* Ex. P (March 9, 2021 Rule 30(b)(6) Deposition of Jochen Kressin)
 3 179:3-181:20 (noting that opening of Elastic code would give floragunn additional visibility into
 4 Elastic's development activities); *see L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841,
 5 848 (9th Cir. 2012) *abrogation on other grounds recognized by Unicolors, Inc. v. H&M Hennes*
 6 *& Mauritz, L.P.*, 959 F.3d 1194, 1198 (9th Cir. 2020) (noting participation in the same industry as
 7 relevant to widespread dissemination). And because floragunn was providing a plug-in for
 8 Elasticsearch, moreover, [REDACTED]
 9 [REDACTED] Ex. Q (April 27, 2021 Rule 30(b)(6) J. Kressin Dep. Ex. 326 at 1 ([REDACTED]
 10 [REDACTED])).

11 Even in isolation from other evidence, the widespread availability of Elastic's binaries and
 12 the ease decompiling them is a sound basis for opining that floragunn had a reasonable
 13 opportunity to view Elastic's copyrighted work through decompilation of Elastic's binaries. *See*
 14 *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1068 (9th Cir. 2020)
 15 ("Given the ubiquity of ways to access media online, from YouTube to subscription services like
 16 Netflix and Spotify, access may be established by a trivial showing that the work is available on
 17 demand."); *Three Boys Music Corp.*, 212 F.3d at 482-85 (holding that there was sufficient
 18 evidence of access to an Isley Brothers song by Michael Bolton because Mr. Bolton was a fan of
 19 the Isley Brothers and the song was on the radio when Mr. Bolton was a teenager). Because the
 20 relevant question is reasonable opportunity to access, Dr. Walker is not required to opine that
 21 floragunn in fact accessed the code for his opinions to be admissible. And floragunn's citation to
 22 *Ollier v. Sweetwater Union High School District* does not show otherwise: that case concerned
 23 experts who were offered to opine on high school athletics, athletic facilities, and equitable access
 24 to the same in a Title IX case. 768 F.3d 843, 860 (9th Cir. 2014). Beyond the distinguishing fact
 25 that they were not opinions on "reasonable opportunity to access" under copyright law, (1) one
 26 expert had never visited the school in question before issuing his report, and (2) the other expert
 27 spent only an hour at that school. Further, the experts' opinions were "based on their 'personal
 28 opinions and speculation rather than on a systematic assessment of [the school's] athletic facilities

1 and programs.”” *Id.* at 861. Neither the relevant issues nor the work of the experts is similar to Dr.
2 Walker’s opinions.

3 But Dr. Walker’s opinion provides further bases for admission—he applied his technical
4 knowledge and experience with decompilation to opine that several elements in the accused code
5 indicate that it was created by decompiling Elastic source code. Ex. G ¶¶ 96, 227, 238-239; Ex. M
6 ¶¶ 96-97, 102; Ex. N 127:12-22, 192:10-194:2, 229:14-21. floragunn’s Motion ignores all but one
7 of these indicia of decompilation. Mot at 7.⁴ And, like his other opinions on decompilation, Dr.
8 Walker bases this opinion on his technical knowledge and experience. *See, e.g.*, Ex. G ¶ 96 (“In
9 my experience, the reverse compilation process cannot restore comments such as those present in
10 the Elastic source code.”); *id.* ¶ 233 (“I am familiar with the use of reverse compilation in general
11 and specifically use of reverse compilation in the context of java binary files (called ‘java class
12 files’).”); *see also* Ex. N 20:23-21:9, 28:9-17 (testifying that Dr. Walker decompiled binaries as
13 part of his work on a previous lawsuit and also used decompilation to understand the operation of
14 “a number of different” Android applications and Java applications). While Dr. Walker does not
15 present any of these indicia as conclusive proof of decompilation, he is not required to find
16 conclusive proof for his opinion to be reliable. *See Primiano*, 598 F.3d at 565 (“Lack of certainty
17 is not, for a qualified expert, the same thing as guesswork.”). And, while Dr. Astrachan may
18 disagree with Dr. Walker’s conclusions, *see, e.g.*, Ex. B ¶ 47, this is not a basis on which to
19 exclude Dr. Walker’s opinions. *See Alaska Rent-A-Car, Inc.*, 738 F.3d at 969–70 (“The district
20 court is not tasked with deciding whether the expert is right or wrong, just whether his testimony
21 has substance such that it would be helpful to a jury.”)

22 Finally, Dr. Walker relies on the admission of Mr. Saly—the author of 100% of the code
23

24 ⁴ If floragunn is contending that Elastic’s interrogatory responses during fact discovery should
25 limit Dr. Walker’s expert opinion, those responses expressly contradict that argument, stating
26 “Elastic further objects to this Interrogatory because it calls for expert disclosures before the date
27 for such disclosures set by the Court’s Case Management Order in this case and Federal Rule of
28 Civil Procedure 26. Elastic will supplement its response to this Interrogatory consistent with the
Federal Rules of Civil Procedure and the Court’s Case Management Order regarding expert
reports through, at least, such reports.” Declaration of Michael Kwun in Support of floragunn’s
Motion Ex. D, Responses to Interrogatories Nos. 15 & 16.

1 that Dr. Walker opines was created through decompilation—that he had decompiled Elastic’s
 2 Shield binaries. Ex. G ¶¶ 89, 105, 120, 189, 227. In a phone call with an Elastic co-founder, Uri
 3 Boness, about a potential job with Elastic, Mr. Saly admitted to decompiling Elastic’s Shield
 4 binaries to understand how Shield worked while Mr. Saly was developing Defender, the precursor
 5 to Search Guard. Ex. I 31:10-33:14; floragunn’s Amended Answer (Dkt. 82) at 49. Dr. Walker
 6 uses Mr. Saly’s admission to show that Mr. Saly had both the ability to decompile Elastic’s code
 7 and knew the benefits of decompiling Elastic’s code. Ex. N 125:14-22.⁵

8 When considered in the context of Dr. Walker’s opinions, floragunn’s criticisms are
 9 unfounded. Rather than being “abstract” or “speculative,” *see* Mot. at 6–7, Dr. Walker’s opinion
 10 that it was technically possible for floragunn to decompile Elastic binaries is a necessary part of
 11 Dr. Walker’s broader opinion that floragunn “*actually* had access to Elastic’s code” through
 12 decompilation. Mot. at 6 (emphasis in original). floragunn also faults Dr. Walker’s opinion that
 13 Elastic’s binary files were widely available to the public because “Elastic’s *binary files* cannot be
 14 read by developers.” Mot at 8 (emphasis in original). But Dr. Walker does not opine that Elastic’s
 15 binary files were read by developers—he opines that Elastic’s binary files were widely distributed
 16 and that floragunn easily could have, and actually did, decompile Elastic’s binary files to access
 17 Elastic’s source code.

18 floragunn’s criticism that Dr. Walker did not himself decompile Elastic binary files is
 19 misplaced. *See* Mot. at 7. First, Dr. Walker cites a conversation with Elastic engineer Tim
 20 Venum for his understanding that specific Elastic code (`if (action.equals`
 21 `(TransportShardBulkAction.ACTION_NAME))` can be transformed by decompilation
 22 into a form `if (action.equals(indices:data/write/bulk[s]))` that matches
 23 the floragunn code. Ex. G ¶ 227. Floragunn identifies no reason that Dr. Walker may not rely on
 24 this very detailed understanding of a decompilation result that an Elastic engineer obtained.
 25 Second, Floragunn fails to identify why the observation that Dr. Walker did not himself

26 _____
 27 ⁵ Contrary to floragunn’s claim, Mot. at 6 n.3, Dr. Walker does not offer Mr. Saly’s admission as
 28 habit evidence under Federal Rule of Evidence 406. Rather, Dr. Walker relies on that admission
 to show that Mr. Saly had the ability to decompile Shield binaries and knew decompilation could
 show him how Shield worked. Ex. N 125:14-22.

1 decompile Elastic binaries undermines Dr. Walker’s opinions or what floragunn expects such an
 2 exercise would have yielded. Given the plethora of other evidence, Dr. Walker was not required
 3 personally to decompile Elastic binaries to arrive at a reliable opinion regarding access. But if
 4 floragunn’s point is that Dr. Walker should have attempted to duplicate Mr. Saly’s decompilation
 5 activities, Mr. Saly’s supposed unavailability made it impossible for Dr. Walker to do so
 6 reliably.⁶ Different decompilation programs and settings may yield different decompilation results
 7 when applied to the same binary. Ex. M ¶ 100; Ex. N 199:21-200:5. Absent Mr. Saly’s testimony
 8 about what decompilation program and settings he used or had access to, there would be no
 9 reliable way to recreate his decompilation process. *See id.* 215:17-20 (“I don’t know which --
 10 what decompiler Mr. Saly was using, and I don’t know what the state of the reverse compiled
 11 JAVA code would look like using Mr. Saly’s decompiler.”) And even if Dr. Walker had been
 12 able to recreate the complete software environment that Mr. Saly used for decompilation, Mr.
 13 Saly would not necessarily have copied decompiled source code into Search Guard without
 14 alteration. *See id.* 193:20-194:8 (testifying that decompiled code “isn’t the most efficient or
 15 easiest to understand” so developers often “rewrite the code to be more understandable or easier
 16 to read”); *id.* 227:15-24; *see also* Ex. M ¶ 102. To whatever extent floragunn contends Dr.
 17 Walker’s lack of decompilation makes his opinions infirm, floragunn may point that out to the
 18 jury on cross-examination, but it is not grounds to exclude Dr. Walker’s opinions on
 19 decompilation, especially given all the other bases for that opinion. *Primiano*, 598 F.3d at 564
 20 (“Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and
 21 attention to the burden of proof, not exclusion.”).⁷

24 ⁶ Elastic noticed as a Rule 30(b)(6) topic “reverse engineering or decompiling of object code for
 25 X-Pack, including without limitation any object code corresponding to the Infringed Code, by
 26 floragunn or any of its agents, employees, or contractors.” Ex. R (Elastic’s Notice of Rule
 27 30(b)(6) Deposition) Topic No. 8. But floragunn’s corporate representative could not provide an
 28 answer about Mr. Saly’s decompilation, testifying that Mr. Saly told him that he either did not
 decompile Elastic binaries or could not remember doing so. Ex. P 128:23-129:13.

⁷ floragunn makes no argument that any of Dr. Walker’s opinions are inadmissible under Federal Rule of Evidence 403.

B. Dr. Walker May Rely on Hendrik Saly's Admission that he Decompiled Elastic's Shield Binaries

Mr. Saly's statement that he had decompiled Elastic's Shield binaries is admissible and, even if not admissible, is a proper object of reliance for Dr. Walker.

First, Mr. Saly's admission to Uri Boness that Mr. Saly had decompiled Elastic's binaries is admissible as a statement against interest. Fed. R. Evid. 804(b)(3). It is uncontroversial that Mr. Saly is unavailable within the meaning of Federal Rule of Evidence 804(a). floragunn contends that Mr. Saly is unavailable for [REDACTED]. Joint Discovery Letter (Dkt. 101-3) 4-6; *see* Fed. R. Evid. 804(a) [REDACTED] floragunn has produced a [REDACTED] claiming that Mr. Saly must be [REDACTED] to testify. Joint Discovery Letter (Dkt. 101-3) at 3.

And Mr. Saly's statement is against his interest because it exposes him to civil liability—decompilation of Elastic's binaries, standing alone, is civilly actionable as copyright infringement. *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992); 4 Nimmer on Copyright § 13.05 (2019); *see EnTech, Ltd. v. Speece*, 841 F. App'x 944, 952 (6th Cir. 2021) (nonparty's statement that defendant told him to convert computer owned by plaintiff was admissible as statement against nonparty's interest); *Ormsby Motors, Inc. v. Gen. Motors Corp.*, 842 F. Supp. 344, 348 n.6 (N.D. Ill. 1994) (investigator's deposition testimony containing nonparty's statements implicating himself in preparation of false warranties admissible as statements against nonparty's interest). Any reasonable person in Mr. Saly's position would know decompiling Shield binaries was not authorized and that his statement that he had done so could expose him to civil liability. *See Marya v. Warner/Chappell Music, Inc.*, 131 F. Supp. 3d 975, 992 n.14 (C.D. Cal. 2015) (reasonable to infer that songwriter knew that her statement that she had abandoned her copyright interest in a song was against her pecuniary interests). That admission is sufficient to make the statement against his interest. *See* Fed. R. Evid. 804(b)(3)(A) (exposure to "civil or criminal liability" sufficient for statement against interest). Further, Dr. Walker's technical opinions on the ease of decompilation and indicia of decompilation in code

1 generated by Mr. Saly corroborate Mr. Saly's admission to Mr. Boness.⁸

2 And, even if Mr. Saly's statement were inadmissible, Dr. Walker could still properly
3 consider it. Experts in Dr. Walker's field commonly rely on statements by software developers
4 regarding how they developed code, including statements about the origin of code relayed by
5 third parties. *See* Fed. R. Evid. 703 ("If experts in the particular field would reasonably rely on
6 those kinds of facts or data in forming an opinion on the subject, they need not be admissible for
7 the opinion to be admitted."); *V5 Techs., LLC v. Switch, Ltd.*, 501 F. Supp. 3d 960, 964 (D. Nev.
8 2020) (proper for expert to rely on hearsay statement of sales representative that air conditioning
9 and smoke detection systems were substandard and faulty). floragunn's expert, Dr. Astrachan
10 testified that he commonly relies on hearsay statements by persons with knowledge about how
11 code was developed. Ex. O 182:16-183:6 (testifying that, in previous cases, Dr. Astrachan has
12 spoken with "lead" developers who did not actually write the code at issue).⁹ And Dr. Astrachan
13 testified that the only developer that he spoke with to render his opinions in this matter was the
14 purported "lead developer" at floragunn: Jochen Kressin. Ex. O 181:10-183:12.

15 floragunn argues that Dr. Walker's reliance on Mr. Saly's admission is inadmissible
16 because Dr. Walker did not bring his technical expertise to bear on it. Mot at 6. But Mr. Saly's
17 admission forms one part of Dr. Walker's broader technical opinion on floragunn's
18 decompilation. Dr. Walker evaluated whether Mr. Saly's statement was consistent with Dr.
19 Walker's technical knowledge and experience regarding decompilation, and Dr. Walker further
20 confirmed indicia of decompilation in floragunn's code that are consistent with Mr. Saly's

22 ⁸ For similar reasons, Mr. Saly's statements are admissible under Federal Rule of Evidence 807.
23 *See United States v. Wong*, No. CR 17-0407 WHA, 2018 WL 5776336, at *1 (N.D. Cal. Nov. 2,
24 2018). Mr. Saly's statement's circumstantial guarantees of trustworthiness have been described
25 above. Mr. Saly's admission to decompilation of Shield binaries is a material fact in this case.
26 And, because Mr. Saly has not been made available for deposition, Mr. Saly's statement to Mr.

27 ⁹ To whatever extent floragunn argues that Mr. Saly's admission to Mr. Boness shouldn't be
28 disclosed to the jury, Elastic notes that since Mr. Saly is purportedly unavailable, the probative
value of Mr. Saly's admission to Mr. Boness is high in helping the jury understand Dr. Walker's
opinion, and floragunn's ability to cross-examine both Mr. Boness and Dr. Walker ameliorates
any purported prejudicial effect. *See* Fed R. Evid. 703.

1 decompilation of binaries to create accused floragunn code. *See, e.g.*, Ex. G ¶¶ 89, 105, 120, 189,
 2 227 (noting that it would have been technically possible for floragunn to decompile Elastic’s
 3 binaries); *id* ¶¶ 96, 227, 238-240 (noting indicia of decompilation in floragunn’s source code); Ex.
 4 M ¶¶ 96-97, 102 (same); Ex. N 127:12-22, 192:10-194:2, 229:14-21 (same). Dr. Walker brought
 5 his expertise to bear on Mr. Saly’s statement and added, at least, “background knowledge or
 6 context” to it and then used it in forming a broader technical opinion. *See Marvel Characters, Inc.*
 7 *v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013).

8 Dr. Walker’s opinion is nothing like the opinion at issue in *Caldwell v. City of San*
 9 *Francisco*, where a damages expert with no training or experience as a vocational expert testified
 10 that the wrongfully incarcerated plaintiff could have been employed as a carpenter, insurance
 11 salesperson, or construction manager. In doing so, that purported expert relied on “non-scholarly
 12 websites,” plaintiff’s “self-reported skills, information from plaintiff’s attorneys, and unidentified
 13 opinions offered by [another individual],” with “no indication of how [the expert] applied his
 14 purported expertise to synthesize or analyze the facts upon which he relied.” No. 12-CV-01892-
 15 DMR, 2021 WL 1391464, at *5 (N.D. Cal. Apr. 13, 2021). Accordingly, the court found that the
 16 individual offering the opinion as to plaintiff’s vocational aptitude was “essentially functioning as
 17 a ‘mouthpiece of the [individuals] on whose statements or opinions he purports to base his
 18 opinion.’” *Id.* (quoting *Wi-LAN Inc. v. Sharp Elecs. Corp.*, — F.3d —, 2021 WL 1257074, at
 19 *6 (Fed. Cir. Apr. 6, 2021)). Here, Dr. Walker considered deposition testimony in this case to
 20 inform one part of a well-explained opinion that uses his technical expertise regarding
 21 decompilation. Dr. Walker is furthermore not “vouch[ing]” for Uri Boness’s testimony or judging
 22 Mr. Boness’s credibility—he is properly bringing his technical expertise to bear on it and
 23 considering it in the context of forming his technical opinion on floragunn’s decompilation of
 24 Elastic’s binary code.

25 floragunn points to no evidence that contradicts Mr. Boness’s testimony regarding Mr.
 26 Saly’s admission, floragunn deposed Mr. Boness, and floragunn has not made Mr. Saly available
 27 to testify to his “side” of the story. And, even if there were evidence contradicting Mr. Boness’s
 28 testimony, any failure by Dr. Walker to consider that evidence would go to the weight of his

1 opinions, not their admissibility.¹⁰

2 **C. Even if the Court Strikes Dr. Walker’s Opinion on Access Through**
 3 **Decompilation, Dr. Walker Should be Allowed to Testify on Substantial**
 4 **Similarity**

5 Even if the Court were to hold that Dr. Walker may not opine on floragunn’s
 6 decompilation of Elastic binaries, Dr. Walker should still be permitted to opine on substantial
 7 similarity for those sections of code. Dr. Walker’s opinion on substantial similarity in no way
 8 depends on his opinion regarding access, and Dr. Walker should be able to present his opinion on
 9 substantial similarity independently of his opinion on access. *See Skidmore*, 952 F.3d at 1069
 10 (“[A]ccess, however, in no way can prove substantial similarity.”). floragunn contends that
 11 “[a]bsent access, any purported similarity between the Elastic code and the floragunn code is
 12 irrelevant.” Mot. at 8. Should the Court exclude Dr. Walker’s testimony on decompilation, it is
 13 true that Elastic would need to prove access to those particular code segments in other ways. With
 14 such proof, Elastic could still proceed with its claims regarding copying of those code segments,
 15 and Dr. Walker’s opinions on substantial similarity would still be relevant.

16 **V. DR. WALKER’S OPINION THAT THE FLORAGUNN SOURCE CODE IS**
 17 **SUBSTANTIALLY SIMILAR IN TOTAL CONCEPT AND FEEL TO THE**
 18 **ELASTIC SOURCE CODE IS BASED ON RELIABLE METHODS AND WOULD**
 19 **BE HELPFUL TO THE JURY**

20 floragunn argues that Dr. Walker’s opinions that “a reasonable computer programmer
 21 would find the source code substantially similar in total concept and feel,” *e.g.*, Ex. G ¶ 73,
 22 should be excluded because they “engage[] in the wrong comparison under Ninth Circuit
 23 precedent,” Mot at 8-9. But Dr. Walker’s opinions are sound under Ninth Circuit precedent and
 24 would be helpful to the jury.

25 floragunn argues that Dr. Walker relied “only on a comparison of the allegedly copied
 26 code from floragunn and Elastic” and that this is inappropriate because “the intrinsic test requires
 27

28 ¹⁰ If the Court were to hold that Dr. Walker may not rely on Mr. Saly’s admission, Dr. Walker’s
 opinion that floragunn accessed Elastic code through decompiling Elastic binaries still has
 sufficient basis to be admissible: As shown *supra*, Dr. Walker also bases his opinion on (1) his
 experience decompiling Java binaries, (2) indicia of decompilation he found in floragunn’s
 accused source code, (3) the widespread availability of Elastic’s binaries, and (4) the technical
 ease by which floragunn would have been able to decompile Elastic’s binaries.

1 a comparison of the *works* to determine whether the *works* are substantially similar in total
 2 concept and feel.” Mot. at 8-9 (emphasis in original). While the intrinsic test does focus on
 3 substantial similarity in “total concept and feel,” it focuses on the subjective reaction of the
 4 reasonable, ordinary audience of a work to *expression* found in the work. *Apple Computer, Inc.*,
 5 35 F.3d at 1442 (“[T]he intrinsic test continues to measure expression subjectively.”). Here, the
 6 relevant audience for the intrinsic test is the reasonable, ordinary computer programmer. *Mobile*
 7 *Active Def., Inc.*, 2015 WL 12860491, at *3; *Atari Games Corp.*, 975 F.2d at 844.

8 The scope of Dr. Walker’s analysis was appropriate. floragunn cites *one instance* from Dr.
 9 Walker’s deposition in which Dr. Walker testified that the substantial similarity that was the
 10 subject of *a single paragraph* in his report was found in specific segments of source code
 11 identified in his report. Ex. N 120:3-121:1. Dr. Walker did not so testify with respect to any other
 12 segments of code. And, in forming his opinions, Dr. Walker discussed the broader Elastic
 13 codebase with Elastic engineers who are familiar with the entirety of the Elastic works. *See, e.g.*,
 14 Ex. G ¶¶ 57 & nn.31-32, 58, 75 & nn.45 & 47, 88 & nn.59 & 61, 104 & n.70, 119 & nn.78-80,
 15 139, 154, 170 & nn.114-115, 188 & nn.124-125, 199 & nn.131-132, 226 & n.138, 250, 266, 286
 16 & n.166 (explaining the qualitative significance of the Elastic code segments within the broader
 17 work and citing conversations with Elastic engineers). And Dr. Walker also examined the accused
 18 code within the context of the broader Search Guard work. *See, e.g., id.* ¶ 32 (“Search Guard
 19 offers various security features, including document- and field-level security, that mimic the
 20 security features offered by Elastic.”).

21 For example, in the context of his analysis of infringing `getLiveDocs()` code, Dr. Walker
 22 notes the importance of Elastic’s `getLiveDocs()` code within Elastic’s broader codebase and, in
 23 forming his opinion, discussed the significance of that code with Elastic engineers. *See id.* ¶¶ 57
 24 & nn.31-32, 58 (noting, for example, that “[REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]”). And the same is true for Elastic’s `binaryField` code and `exceptionCaught()` code. *See id.*
 28 ¶ 104 & n.70 (“The relevant Elastic code was added as part of a change that added document- and

1 field-level security to Elastic's Shield product."); *id.* ¶ 119 & nn.78-80 ("Elastic's
 2 exceptionCaught() implementation is part of Elastic's SSL feature.") In short, Dr. Walker
 3 considered significant parts of both Elastic's works and floragunn's works in opining that a
 4 reasonable computer programmer would find the source code substantially similar in total
 5 concept and feel. *See* Ex. M ¶ 119 ("I disagree with Dr. Astrachan that [REDACTED]
 6 [REDACTED]. As I noted in my opening report, the multiple instances of floragunn
 7 code that are substantially similar to or derived from Elastic code are qualitatively important to
 8 the works as a whole. I disagree that the similarities I have identified are [REDACTED]
 9 [REDACTED]").

10 floragunn claims that Dr. Walker's opinions will confuse the jury. Mot at 9. But, even if
 11 floragunn were correct that Dr. Walker should have compared some greater portion of Search
 12 Guard to some greater portion of X-Pack, Dr. Walker's analysis looks at key parts of those
 13 programs' expression and would thus be helpful to the jury in judging substantial similarity in
 14 total concept and feel. If floragunn contends that Dr. Walker examined some lesser portion of the
 15 works at issue than is required, floragunn is free to cross-examine Dr. Walker on exactly what he
 16 considered in forming his opinions on total concept and feel. The jury will not be confused.

17 VI. CONCLUSION

18 For the foregoing reasons, the Court should deny floragunn's motion to exclude portions
 19 of Dr. Walker's testimony.

20 Dated: September 21, 2021

21 DAVID R. EBERHART
 22 JAMES K. ROTHSTEIN
 23 DANIEL H. LEIGH
 O'MELVENY & MYERS LLP

24 By: /s/ David R. Eberhart
 25 David R. Eberhart

26 Attorneys for Plaintiffs
 27 ELASTICSEARCH, INC. and
 28 ELASTICSEARCH B.V.